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Supreme Court, U.S.
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No. 02-260

IN THE

Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C.
and ARIZONA CHEMICAL COMPANY,

Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as Commissioner of the State of Alabama Department of Revenue,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Millcraft-SMS Services, L.L.C. is the successor in interest to Gladwin Corporation; its owners, Millcraft and SMS AG, are privately held corporations. Petitioner Arizona Chemical Company is wholly owned by International Paper Company, which is publicly traded.

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The Commissioner fails to explain how a reasonable taxpayer could have known that Alabama's administrative procedures were the exclusive means to obtain a refund of unconstitutional taxes when the Alabama Supreme Court had to distinguish 45 years of its own precedent and overrule two Alabama Court of Civil Appeals opinions to reach this result. The Commissioner's brief in opposition misses the point of the petition. The Alabama Supreme Court violated the Due Process Clause by holding out a clear and certain remedy for refunds of unconstitutional taxes and then taking it away after this Court decided *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). Petitioners offer the following reply to the Commissioner's brief.

First, the "adequate and independent state law ground" doctrine has no application to this case. *See* Resp.'s Br. at 9–14. Contrary to the Commissioner's protestation otherwise (*id.* at 12), this case falls squarely within the novelty exception to the doctrine, recognized in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958). *Accord Ward v. Love County*, 253 U.S. 17, 22–23 (1920); *see generally* HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 580 & n.4 (4th ed. 1996) (explaining the novelty exception); E. CHEMERINSKY, FEDERAL JURISDICTION § 10.5.2, at 669–70, 674–76 (3d ed. 1999) (same); R. STERN, ET AL., SUPREME COURT PRACTICE § 3.26, at 210 (8th ed. 2002) (same). The Commissioner fails to appreciate that the Alabama Supreme Court's decision itself violated due process by changing the remedies available to Petitioners in the midst of this litigation. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444–45 (1998); *Reich v. Collins*, 513 U.S. 106, 108, 110–11 (1994); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678–82 (1930). The Commissioner cannot prevent this Court's review of such a bait and switch by contending the decision below rests on a state law ground that did not exist until the Alabama Supreme Court decided this case. As this Court held in *Reich*, "Novelty in procedural

requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 513 U.S. at 113 (quoting *NAACP*, 357 U.S. at 457–58). Here, because "nothing in the prior state cases . . . suggest[ed]" that the TBOR's administrative procedures were "the *exclusive* remedy" for a refund of unconstitutional taxes, Petitioners cannot "fairly be deemed to have been apprised" of the remedy's exclusivity. *NAACP*, 357 U.S. at 457. This is especially true considering that the Alabama Supreme Court in the prior appeal induced Petitioners to rely on their legal remedy, only to pull that remedy out from under them in its ultimate decision. This gambit failed the State of Alabama in *NAACP*, and it fails here for the same reason. *Compare NAACP*, 357 U.S. at 458, *with* Pet. App. 34a n.3, 70a–72a.

On the merits of the petition, the question is whether the Alabama Supreme Court held out what a reasonable taxpayer would have seen as a clear and certain remedy in the form of a direct action for a refund of unconstitutional taxes and then declared, only after this Court decided *South Central Bell*, that no such remedy exists. *Reich*, 513 U.S. at 108. The question is not, as the Commissioner repeatedly suggests, whether taxpayers knew the TBOR provided an alternative means of obtaining a refund. *See* Resp.'s Br. at 8–9, 15–16, 26–27.[1] That point is beyond dispute. The statute itself states that the TBOR's procedures supplement those "otherwise provided by law." ALA. CODE § 40-2A-2(2). Yet, until this case, no reasonable taxpayer would have thought the administrative procedures were the only means to obtain a

1. The Commissioner at two points in her brief makes the astounding claim that "many" taxpayers have received franchise tax refunds. *See* Resp.'s Br. at 8–9, 15. The Commissioner cites no record evidence to substantiate this claim, nor could she. Nothing in the record shows that a single taxpayer has received an appropriate franchise tax refund, let alone many.

refund of unconstitutional taxes, given the numerous cases holding an administrative body such as the Department of Revenue does not have jurisdiction to decide constitutional questions. *See, e.g., Corbitt v. Mangum*, 523 So. 2d 348, 350 (Ala. 1988); *State ex rel. Norwood v. Goldsmith*, 50 So. 394, 395 (Ala. 1909) (holding the statutory refund procedure "refers merely to cases where there has been some clerical mistake or error in the assessment or collection of taxes, and was not intended to clothe the county commissioners or board of revenue with the judicial function of passing upon the validity of an act of the Legislature"). The Commissioner conspicuously fails to answer this point.

The Commissioner has altogether failed to show this Court any case, other than the decision below, holding that the administrative procedures were "the *exclusive* remedy for unlawful taxes." *Reich*, 513 U.S. at 111. She simply quotes the decision below and then repeatedly claims—without citation to any other case—that an "unbroken line of authority" from the Alabama Supreme Court required a taxpayer to follow the statutory procedures to obtain a refund. *See* Resp.'s Br. at 10 ("unbroken line of authority"; no cite); *id.* at 12 ("63 years of . . . precedent"; citing only the decision below); *id.* at 13 ("previous decisions of the Alabama Supreme Court"; no cite); *id.* at 15 ("precedents . . . are consistent and long-established"; no cite); *id.* at 16 (quoting only the decision below). On page 18 of the brief in opposition, the Commissioner eventually cites two cases from 1939 and 1945 (*Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (Ala. 1945), and *J.R. Raible Co. v. State Tax Comm'n*, 194 So. 560 (Ala. 1939)) in an attempt to substantiate her claims. But two cases over five decades old do not make an "unbroken line." The Commissioner's argument overlooks the Alabama Supreme Court's intervening cases from 1956, 1979, and 1983, two of them involving class actions, holding that "the necessity for pursuing the statutory remedy does not exist where the assessment complained of is void and

illegal." *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956) (quoting 84 C.J.S. *Taxation* § 513 at n.90 (1954)), *quoted in Thorn v. Jefferson County*, 375 So. 2d 780, 788 (Ala. 1979) (class action), and *Eagerton v. Williams*, 433 So. 2d 436, 448 (Ala. 1983) (class action). And although the Commissioner contends that the Alabama Supreme Court has never allowed such a direct action against the State as opposed to a county (Resp.'s Br. at 17, 20–21), she fails to mention the 1988 decision in *Sims v. White*, a case involving ad valorem taxes administered by the Alabama Department of Revenue. 522 So. 2d 239, 241–42 (Ala. 1988). In *Sims*, the Alabama Supreme Court disagreed with the Commissioner on this very point, relying on *Eagerton*, *Thorn*, and *Graves* to hold "the procedural requirements of the statute are not always a prerequisite to obtaining the substantive relief provided by the statute." *Id.* at 240–41.

If, as the Commissioner contends, prior Alabama precedents were so clear, then the Alabama Supreme Court would not have had to distinguish *Eagerton*, *Thorn*, and *Graves* and overrule two decisions of the Alabama Court of Civil Appeals to reach its result. *See* Pet. App. 29a–33a. Looking to the same body of Alabama Supreme Court precedent that Petitioners relied on to bring this suit, the Alabama Court of Civil Appeals had held that a direct class action against the Commissioner is a valid means of obtaining a refund of unconstitutional taxes, separate from the administrative procedures. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999); *Sizemore v. Rinehart*, 611 So. 2d 1064, 1067–68 (Ala. Civ. App. 1992). The Court of Civil Appeals had also considered and rejected the Commissioner's argument that sovereign immunity barred such a class action. *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 677 (Ala. Civ. App. 1995). Although the Commissioner now characterizes *Valhalla Cemetery*, *Rinehart*, and *Owner-Operator* as "aberrant" and "obviously mistaken decisions" (Resp.'s Br. at 15, 17), they can only be so characterized "in retrospect." *NAACP*, 357 U.S. at 457. She fails to explain how any reasonable taxpayer

before this case could have concluded that the administrative procedures were "the *exclusive* remedy for unlawful taxes," *Reich*, 513 U.S. at 111, when not a single judge on the Alabama Court of Civil Appeals had so concluded.[2] The fact that the Alabama Supreme Court had to expressly overrule *Valhalla Cemetery* and *Rinehart* and implicitly overrule *Owner-Operator* is the best evidence that the decision below is an unconstitutional bait and switch prohibited by *Reich* and *Newsweek*.

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2. The cases the Commissioner cites for the proposition that *Valhalla Cemetery*, *Rinehart*, and *Owner-Operator* "are contrary to the vast weight of authority in the Court of Civil Appeals" (Resp.'s Br. at 18 n.2) do not support the proposition. All of those cases involve taxpayers who elected to pursue their administrative remedies under the TBOR; none involved taxpayers who elected to file a direct action. *See Tindle v. State Farm Gen. Ins. Co.*, __ So. 2d __, 2001 WL 564284, at *4 (Ala. Civ. App. May 25, 2001) (involving challenge to insurance rate that fell within primary jurisdiction of Department of Insurance; citing the TBOR merely as comparable statute), *reh'g denied* (July 27, 2001), *writ quashed by Ex parte Tindle*, __ So. 2d __, 2002 WL 92921 (Ala. Jan. 25, 2002); *State Dep't of Revenue v. Garner*, 812 So. 2d 380, 383–84 (Ala. Civ. App. 2001) (holding taxpayer filed inadequate supersedeas bond under the TBOR); *State Dep't of Revenue v. Taft Coal Sales & Assocs., Inc.*, 801 So. 2d 838, 839 (Ala. Civ. App. 2001) (noting merely that taxpayer complied with procedures of the TBOR); *State Dep't of Revenue v. Adams*, 798 So. 2d 682, 684 (Ala. Civ. App. 2001) (holding taxpayer filed untimely appeal in wrong forum under the TBOR); *State Dep't of Revenue v. Medical Care Equip., Inc.*, 737 So. 2d 471, 473 (Ala. Civ. App. 1999) (finding taxpayer failed to perfect claim by paying tax or posting supersedeas bond under the TBOR); *State v. Union Oil Co.*, 686 So. 2d 284, 286 (Ala. Civ. App. 1996) (noting merely that taxpayer complied with procedures of the TBOR); *State Dep't of Revenue v. Kennington*, 679 So. 2d 1059, 1059–60 (Ala. Civ. App. 1995) (same); *State Dep't of Revenue v. Zegarelli*, 676 So. 2d 354, 355 (Ala. Civ. App. 1996) (holding taxpayer filed untimely appeal without paying the tax or posting a supersedeas bond under the TBOR); *State Dep't of Revenue v. Wilcox*, 639 So. 2d 1374, 1374 (Ala. Civ. App. 1994) (holding taxpayer filed untimely appeal under the TBOR).

In addition, no prior precedent indicated that the act of providing a tax refund is ministerial "only because the statutes make it so." Pet. App. 29a (emphasis removed). The Commissioner does not cite any case, other than this case, for that proposition. *See* Resp.'s Br. at 19. This is understandable, given that the Alabama Supreme Court could not either. *See* Pet. App. 29a. It defies logic to maintain that the act of refunding unconstitutional taxes is ministerial if the taxpayer pursues statutory procedures, yet the same act is not ministerial if the taxpayer sues directly for a refund. Moreover, the Commissioner cannot explain how the TBOR could make that act ministerial when the Alabama Constitution prevents the Legislature from waiving the State's sovereign immunity. *See* Pet. 10–11. Petitioners agree with the Commissioner that this is "bizarre." Resp.'s Br. at 23. It also indicates the lengths to which the Alabama Supreme Court was willing to go to avoid this Court's decision in *South Central Bell*.

Finally, the Commissioner reveals the extent of Alabama's recalcitrance in this matter by arguing that *South Central Bell* did not hold Alabama's foreign franchise tax unconstitutional. *See* Resp.'s Br. at 20–21, 22.[3] Though this argument is

3. The Commissioner's muddled attempt to distinguish between a "void or illegal" tax and one that has been declared unconstitutional is unavailing for a number of reasons. *See* Resp.'s Br. at 20–21, 22–23. First and foremost, this Court declared that Alabama's foreign franchise was "facially" unconstitutional in *South Central Bell*, 526 U.S. at 169. If a facially unconstitutional tax is not void or illegal, it is hard to imagine what is. Furthermore, the Alabama Supreme Court itself has allowed taxpayers to bypass the administrative refund procedures where, as here, the tax was challenged as unconstitutional and thus "void and illegal." *Thorn*, 375 So. 2d at 788 (equal protection challenge). Finally, the Commissioner's reliance on that portion of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990), discussing a State's options for remedying a discriminatory tax has no bearing on whether a State can revoke a clearly established tax remedy in the course of litigation.

remarkable, it is not surprising. After this Court in *South Central Bell* held that "the franchise tax Alabama assesses on foreign corporations violates the Commerce Clause," 526 U.S. at 162, the Commissioner filed an answer in this case in which she "denie[d] that the foreign franchise tax was unconstitutional and further denie[d] that the U.S. Supreme Court has held that the foreign franchise tax was unconstitutional." Answer ¶ 5 (filed Nov. 17, 2000). She continued to defend the constitutionality of the tax in the trial court (*see* Pet. App. 42a) and now seeks to do the same in this Court. Apparently, the Commissioner will not relent until another decision by this Court holds that *South Central Bell* means what it says.

Although the Commissioner's 28-page brief in opposition strives to portray this case as one concerning the intricacies of Alabama's sovereign immunity law, it is much more significant than that. If this Court allows the Alabama Supreme Court's decision to stand, that decision will become the primer for how to evade this Court's constitutional tax rulings. Whenever this Court invokes the Constitution to protect taxpayers' rights, the States will invoke sovereign immunity to deny the remedy. *Reich* provides the means to break this impasse, for "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment, *the sovereign immunity States traditionally enjoy in their own courts notwithstanding*." 513 U.S. at 109–10 (internal citation omitted; emphasis added). If *Reich* is to have any practical effect, however, this Court must be willing to step in to assure that the remedy follows the right.

Because the Alabama Supreme Court improperly invoked sovereign immunity to take away the taxpayers' right to sue for a refund of unconstitutional taxes, Petitioners ask this Court to grant the petition and summarily reverse the decision below.

Respectfully submitted,

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